SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term 1965

No. 946

In the Matter of

KENNETH REYNOLDS WHEATON.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, Division Three, State of California.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion Below.

Petitioner Kenneth Reynolds Wheaton prays that a writ of certiorari issue to review a decision and order of the District Court of Appeal, Second Appellate District, Division Three, State of California in the cases of the People, Plaintiff and Respondent v. Kenneth Reynolds Wheaton, Defendant and Appellant, numbered in said District Court of Appeal, 2d Criminal No. 9915, which Decision and Order affirmed the Judgments of Conviction appealed from therein in Cases numbered 277 560 and 254 047 Superior Court, Los Angeles County, California. A copy of said Opinion and Order is attached hereto, marked Appendix, and made a part hereof.

II.

Jurisdiction.

The opinion of the District Court of Appeal, State of California, Second Appellate District, Division Three, affirming the Judgments of Conviction in Cases No. 277 560 and No. 254 047 Superior Court, Los Angeles County, California, was rendered and filed in said District Court of Appeal on July 30, 1965. Hearing in the Supreme Court of California, after judgment of the said California District Court of Appeal, was denied September 29, 1965. This petition is being filed within ninety (90) days thereafter.

The jurisdiction of the Supreme Court of the United States to review this case on petition for certiorari is invoked under 28 U.S.C.A. 1253(3).

III.

Questions for Review.

1. Since in *Griffin v. California,* 14 L. Ed. 2d 106, this Honorable Court held that the comment rule approved by California violates the Self-Incrimination Clause of the Fifth Amendment to the Constitution of the United States, which this Court made applicable to the States by the Fourteenth Amendment in *Mallory v. Hogan,* 378 U.S. 1; and that the Fifth Amendment forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt, can, as here, the California Court of Appeal lawfully refuse to reverse the judgments of the Superior Court by virtue of the application of the provisions of Sec. 4½ Article VI California Constitution.

2. Are the aforesaid rights under the Fifth Amendment, being those of due process, so basic that a violation of them cannot be excused under the provisions of Sec. 4½ Article VI California Constitution, but rather that they require automatic reversal *per se*.

IV.

Statement of the Case.

In the Superior Court of the State of California, County of Los Angeles, Case No. 277 560, in each of the first two counts of an amended information Defendant and Appellant therein (your petitioner herein) was accused of the crime of forgery (Calif. Penal Code Sec. 470). In each of the third and fourth counts therein he was charged with the crime of violation of Section 475 of the said Penal Code. Defendant pleaded not guilty to each charge. At the trial the jury returned a verdict of guilty with respect to each count. Defendant's motion for a new trial was denied, and as to each of the first two counts he was sentenced to the State Prison for the term prescribed by law. No sentence was pronounced as to the third and fourth counts, the trial court believing that punishment could not lawfully be separately imposed with respect to those counts (Calif. Penal Code 654).

In a prior case (Superior Court, Los Angeles County, No. 254 047) this same Defendant had been found guilty of the crime of violation of Section 10851, California Vehicle Code.

The proceedings were suspended without imposition of sentence and Defendant was placed on probation for three years. Solely because of his conviction of the charges in the instant case, Superior Court, No. 277

560, probation was revoked in the former case, No. 254 047, and he was sentenced to State Prison for the term prescribed by law. From the judgments in both cases your petitioner appealed to the California District Court of Appeal.

The District Court of Appeal thereafter affirmed all judgments; (opinion Appendix hereto). Thereafter Defendant's Petition for Hearing in the Supreme Court of California was denied, as aforesaid.

Said Defendant, your Petitioner, is now serving time in the California State Prison.

The record of relevant testimony in the Superior Court trial in case No. 277 560 was catalogued by Mr. Justice Ford in the opinion of the District Court of Appeal. (Appendix pp. 2 to 13.)

The following, certified by the Clerk of the California District Court of Appeal are filed in this Court herewith:

1. Copy of Reporter's Transcript on the trial
2. Copy of Clerk's Transcript on the Appeal to the District Court of Appeal
3. Copy of Petition for Hearing in California Supreme Court
4. Copy of Order of California Supreme Court Denying Hearing
5. Copy of Praecipe, with affidavit of service by mail on the Trial Judge, the District Attorney and the Attorney General

The State of the Evidence.

The Deputy District Attorney in her argument stated "This case is largely circumstantial. . . ." [Rep. Tr. p. 164.] Every witness who testified for the people as to the actual happenings in this case was suspect and vulnerable as to credibility on at least two points, viz.:

1. Each was either an accomplice or a good friend of the principal accomplice Henry McKay, who turned States Evidence in exchange for immunity. The witness Janet McKay was the wife of Henry McKay, the principal accomplice.

2. Each of said witnesses was, to a greater or lesser degree, obviously an escapist from responsibility and complicity in the alleged crimes, and showed no apparent concern for the Defendant.

They were all prime suspects for possessing bias, prejudice, fear, undue influence as affecting the credibility and accuracy of every one of them.

No denials were made by State's witnesses of the testimony of Ruth Kuykendall, the Defendant's grandmother, that Mrs. Janet McKay came to her home in Hemet, in June, 1963, for the day with Defendant. That she said she had been to see her husband (Henry McKay) at the jail and had said to him that she was going to get a divorce and hoped that she could marry the Defendant; and that McKay had said he would beat her up if she did, and that in July, 1963 Mrs. McKay came to Hemet with her husband, Henry McKay, and said:

> "Hank has made a deal with the cops that if they will let him out he will put the finger on some person."

Said witness also said that the person referred to was the Defendant. (Appendix, p. 12.)

Nor was there a denial of the testimony of Harold Fulkman, Defendant's cousin, that on the last Sunday in July of 1963, he heard Henry McKay say to his (Fulkman's) grandfather: "If I cannot get him here, then I will get him into Chino (a State prison) and will get him there." (Appendix, p. 12.)

Nor was there a denial of the testimony of Joseph L. Kuykendall that he had a conversation with Henry (Hank) McKay near Hemet on the last Sunday in July, 1963, wherein Mr. McKay said: "Kenny Wheaton is going to do what he is told or I will get my boys to make him 'march' ", and also McKay said: "Kenny ran with Jan while I was in jail and I will burn him." (Appendix, p. 12.)

The Defendant elected not to testify in his own behalf.

The Comment of the Prosecutor, the Nature of Which Was Condemned by This Court in Griffin v. California, 14 L. Ed. 2d 106.

Then in this atmosphere, the Prosecutor, in her opening argument to the jury made the following comment:

> "We have heard a lot of testimony from a lot of different people over the last few days and a great deal of it will depend upon your evaluation of the credibility of these witnesses.
>
> "However, the people believe there is sufficient other evidence to help support the theory of its case, of our case. First off, it is to be noted that the defendant has not taken the stand to explain or otherwise affirmatively present any evi-

dence in this case. This is certainly within his right, no person under the Federal or State Constitution may be compelled to testify, and that fact alone would certainly not be any basis for your finding him guilty. Nevertheless, it is the law, and the Court will so instruct you at the conclusion, that you may consider this along with all the other evidence in the case in evaluating it. If you feel that the state of the evidence has reached the point where the defendant could explain or it would be reasonable for him to explain, or to deny certain allegations, then you may take his failure to testify as one of those factors which you may consider in arriving at your verdict." [Rep. Tr. p. 129, line 11.]

The Instructions of the Trial Judge.

The trial Judge instructed the jury, in part, as follows:

"The corroboration of the testimony of an accomplice is sufficient, if of itself alone it tends to connect the defendant with the commission of the offense, *although it may be slight, although if standing by itself it would be entitled to but little consideration.*" [Rep. Tr. p. 120, line 19.] (Italics added.)

The Instruction of the Trial Judge, of the Nature of That Which Was Condemned in Griffin v. California (14 L. Ed. 2d 106).

The trial Judge instructed the jury, in part, by following the then California accepted instruction, in effect as follows:

That a defendant has a constitutional right not to testify; but that as to any evidence or facts against him

which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. And that, however, no such inference could be drawn as to evidence respecting which the defendant had no knowledge. That the failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt. Nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof. (Appendix, p. 17.)

The Ruling of the District Court of Appeal.

Then, the California District Court of Appeal, after conceding the error of the prosecutor and of the trial Judge, because of the ruling of this Court in *Griffin v. California*, 14 L. Ed. 2d 106, said:

> "The effect of the error must be determined in the light of Article VI, Section 4½ of the California Constitution. (*People v. Bostick*, 62 Cal. 2d 820, 62 A.C. 869, 872.)
>
> "After a review of the entire record, however, we have concluded that in the absence of the challenged instruction and the comment of the prosecutor, it is not reasonably probable that the jury would have reached a verdict more favorable to the Defendant. There has been no miscarriage of justice because of the error." (Appendix, p. 17.)

Section 4½ of Article VI California Constitution.

This Section verbatim is:

> "No judgment shall be set aside, or new trial granted in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleadings, or for any error as to any matter of procedure; unless, after an examination of the entire cause, *including the evidence,* the Court shall be of the opinion that the error complained of has resulted in a miscarriage of jusice." Amendment adopted Nov. 3, 1914. (Italics added.)

A petition for Hearing in the California Supreme Court, after judgment of said District Court of Appeal, was denied September 29, 1965.

Reasons for Granting the Writ of Certiorari.

Article VI, Section 4½ Not Applicable.

The application of Art. VI, Sec. 4½ California Constitution, as here, invades the province of the trial jury, and therefore deprives petitioner of his right to trial by jury, thus depriving him of a fair trial implicit under the due process guaranteed by the Fourteenth Amendment United States Constitution.

The Supreme Court of California recently said in *People v. Modesto* (1963), 59 Cal. 2d 722, 730:

> "Reversal is not required because of reasonable probability that in the absence of the error the jury would have reached a different verdict, ***but because the defendant has a constitutional right to have the jury determine every material issue presented by the evidence.*** Regardless of how overwhelming the

evidence of guilt may be, the denial of such a fundamental right cannot be cured by Art. VI, Section 4½, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." (Italics added.)

This court has repeatedly, held this to be a Federal Question:

Ward v. Texas, 316 U.S. 547, 550:

"When as in this case the question is properly raised as to whether a defendant has been denied the due process of law, we cannot be precluded by the verdict of the jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process."

Haynes v. Washington, 373 U.S. 503, 515:

"Our conclusion is in no way foreclosed, as the state contends, by the fact that the state trial judge, or the jury may have reached a different result on this issue.

It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of independent determination here."

(p. 518).:

"In reaching the conclusion which we do we are not unmindful of substantial independent evidence lending to demonstrate the guilt of the petitioner. As was said in Rogers vs. Richmond, 365 U.S. 534, 541:

'Indeed in many of the cases in which the command of the Due Process Clause has compelled us to reverse State convictions involving the use

> of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally inpermissible methods in their inducement.' "

Of course, we neither express nor suggest a view with regard to the ultimate guilt or innocence of the petitioner here. That is for the jury to decide on a new trial free of constitutional infirmity which the state is at liberty to order.

The true test is: Has the defendant been so prejudicial by the errors as to infect his whole trial with an absence of that fundamental fairness essential to the very concept of justice.

Escobel v. Illinois, 378 U.S. 478;
Gideon v. Wainright, 372 U.S. 335, 342.

At stake here lies the issue as to whether in the circumstances here confronting this defendant his silence was tantamount to a confessorial admission.

In *Griffin, supra,* this Court said:

> "The question remains whether, statute or not, the comment rule approved by California, violates the Fifth Amendment. We think it does. It is *in substance a rule of evidence* that allows the state the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the Court's acquiescence are *the equivalent of an offer of evidence and its acceptance.*" (Italics added.)

This being true, the defendant was deprived of his right to due process under the Constitution of the United States, to be protected against illegally obtained evidence. And as has been repeatedly held, a denial of this right compells automatic reversal *per se*.

There is no difference between a violation of such rights before trial and a violation thereof during the trial.

Conclusion.

How is it possible, under the guise of Sec. 4½, Art. VI, California Constitution, to determine what a jury would have been likely to do, given different evidence? This very provision leaves open such a wide area of speculation, as to make a defendant entitled to have his case judged solely by a jury of his peers, helpless in the clutches of this ambiguous and dangerous provision, wherein the final judgment is placed in the hands of appellate justices, who, while concededly learned and conscientious, were not at the trial, and could not possibly judge of the credibility of witnesses without observing them as they testified, and could not therefore second guess the jury.

As to the errors here conceded, we must not forget the "touchy" situation as to juries. Jurors are prone to give careful consideration to the words and attitudes of the Prosecuting Attorney, and the trial judge tells the jury they must follow his instructions.

Respectfully submitted,

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